

CORRESPONDENCE
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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC - MAIL ROOM

In re Applications of)	MM Docket No. 93-241
)	
DARRELL BRYAN)	File No. BPH-920109MA
)	
SBH PROPERTIES, INC.)	File No. BPH-920123MD
)	
)	
For Construction Permit for		
New FM Channel 276A		
Tusculum, Tennessee		

To: Honorable John M. Frysiak
Administrative Law Judge

MOTION TO COMPEL

SBH Properties, Inc. ("SBH") by counsel, pursuant to Section 1.325 of the Commission's Rules, herewith moves for an order compelling Darrell Bryan ("Bryan") to produce documents responsive to SBH's "Supplemental Request for Production of Documents," filed February 1, 1994. In support whereof the following is shown:

1. On February 1, 1994 SBH filed its "Supplemental Request for Production of Documents" (hereafter "Supplemental Request"), pursuant to Section 1.325(c)(3) of the Rules and the Order (93M-752) of the Presiding Judge, released December 15, 1994 (copy attached as Exhibit A). SBH's Request indicated that the documents requested should be produced on or before February 11, 1994, in accordance with the ten (10) day response period set forth under Section 1.325(a)(2). Bryan failed to either produce

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the documents requested or to file any objection or claim of privilege within the ten day period.

2. On February 15, 1994, Bryan filed an Opposition to Supplemental Request for Production of Documents (copy attached as Exhibit B). Accordingly, this Motion is being filed within five (5) business days, pursuant to Section 1.325(a)(2).

3. As indicated above, Bryan's Opposition is untimely. While in his Opposition, Bryan indicates that his counsel did not receive a copy of SBH's "Supplemental Request" until February 12, 1994, due to a delay in the mails, he does not offer any justification for his failure to submit his Opposition promptly, on the next business day. Accordingly, having failed to timely respond, Bryan has waived any objection and he should be ordered to produce the documents requested.

4. Furthermore, even if his untimely response is considered, Bryan's Opposition is without merit. Initially, Bryan's Opposition essentially is comprised arguments regarding the ultimate impact for comparative purposes of evidence, which might be discovered as a result of the production of the requested documents, evidence which has not yet even been discovered and preserved, much less made a part of the record. As such, Bryan's arguments are more appropriately deferred for inclusion in its proposed findings and conclusions.

5. As the Presiding Judge correctly indicated at the outset of this proceeding, in seeking production of documents, pursuant to a supplemental request, a party is not required to demonstrate

good cause. See: Order Prior to Prehearing Conference (93M-582), released September 13, 1993. Bryan's contention, at best, is that SBH has failed to demonstrate good cause for production of the requested documents. Even if true, this would not form a proper basis for objection. Accordingly, the requested documents should be produced.

6. As demonstrated in SBH's Supplemental Request, Bryan's deposition testimony indicated that Burley Broadcasters, Inc. has a significant outstanding indebtedness to the Greene County Bank, which is represented by a Promissory Note and secured by a security interest in all of the assets of WSMG, as well as a pledge of all the stock of Burley Broadcasters, Inc. Bryan was unable to state with certainty the remaining balance due on the Note. Accordingly, the Note should be produced so that that fact may be more reliably established. Likewise, the stock pledge agreement should be produced, so that the terms and conditions of that agreement can be more reliably determined. 1/

7. Bryan contends that the Commission has always accepted an applicant's divestiture pledge." This is untrue. While a divestiture pledge is generally accepted, with the caveat that any grant will be conditioned upon divestiture, at base such a pledge constitutes nothing more than a rebuttable presumption. In

1. Unlike the UCC-1 filings, relating to the security interest in the assets, the requested documents are not available from public sources, such as the Greene County Clerk's Office and the Office of the Secretary of State.

the end every applicant bears the burden of proof on every aspect of its comparative case. Accordingly, competing applicants have every right to scrutinize an opponent's divestiture proposal and are entitled to sufficient discovery to permit them to attempt to show the contrary. That is all that SBH has sought to do here. Indeed, its Supplemental Request essentially is directed at the production of two documents: a Promissory Note and a Stock Pledge agreement. Under the circumstances Bryan's strenuous objections to producing these documents, a relatively simple and inexpensive procedure, should be viewed with a great deal of curiosity.

8. Finally, the letter submitted by Bryan in support of his Opposition has no bearing, whatsoever, on SBH's right to discovery under the standard comparative issue. Initially, it is not proper to object to discovery of existing documents on the basis that the applicant created or had created a different document, which it would prefer to produce. Furthermore, the letter in question merely serves to raise precisely the same questions which had been raised by the circumstances outlined in SBH's Supplemental Request, i.e., under what circumstances the Bank would permit the sale of WSMG. Indeed, the letter on its face reflects the fact that it was issued only after the Bank had been assured by Bryan that the station would sell for more than enough to pay off the outstanding debt. While the Bank indicates that any "shortfall" could be "handled through a new note with Mr. Bryan," given the Bank's acknowledged reliance upon Bryan's unsupported belief that WSMG will sell for an unusually large

price, there remain the unresolved questions regarding what the Bank would consider an acceptable "shortfall," ²/ questions that could only be adequately resolved through cross-examination. Nor is SBH relying upon "unsupported insinuations" in arguing that the existence of the outstanding indebtedness to the Bank impacts Bryan's ability to divest WSMG. Regardless of what Bryan may argue or the banker may say regarding new notes to cover "shortfalls," the Bank could not, consistent with applicable banking regulations, simply make a loan for any amount, without regard for assuring adequate security. Accordingly, the letter, standing alone, resolves none of the questions that remain with respect to Bryan's proposal.

9. While good cause need not be shown, there is in fact good cause for requiring the production of the requested documents. Bryan was questioned concerning them and was unable to recall certain facts that could be discerned by reviewing the documents. Accordingly, the requested documents should be produced.

WHEREFORE, premises considered, the Presiding Judge should issue an order compelling Bryan to produce promptly the documents

2. While a shortfall of \$ 10,000 to \$ 20,000 might be acceptable, the Bank's letter cannot be read as an indication that the Bank would find a \$ 100,000 to 150,000 shortfall acceptable, yet this is the more likely scenario. Bryan's unsupported contention that the license and minimal assets of WSMG would sell for substantially more than the more than \$ 200,000.00 is ludicrous, given the fact that few, if any, stand alone AM stations have sold for \$ 200,000.00 or more in recent years.

requested in SBH's "Supplemental Request for Production of Documents," filed February 1, 1994.

Respectfully Submitted

SBH PROPERTIES, INC.

By: 

Timothy K. Brady
Its Attorney

P.O. Box 986
Brentwood, TN 37027-0986
(615) 371-9367

February 22, 1994

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 93-241
)	
DARRELL BRYAN)	File No. BPH-920109MA
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SBH PROPERTIES, INC.)	File No. BPH-920123MD
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For Construction Permit for		
New FM Channel 276A		
Tusculum, Tennessee		

To: Honorable John M. Frysiak
Administrative Law Judge

SUPPLEMENTAL REQUEST FOR PRODUCTION OF DOCUMENTS

SBH Properties, Inc. ("SBH") by counsel, pursuant to Section 1.325 of the Commission's Rules and the Order (93M-752) of the Presiding Judge, released December 15, 1994, 1/ herewith submits its Supplemental Request for Production of Documents by Darrell Bryan ("Respondent") and hereby requests that on or before February 11, 1994, that Respondent produce at the offices of SBH's attorney, Timothy K. Brady at 7113 Peach Court, Suite 208, P.O. Box 986, Brentwood, TN 37027, and permit the inspection and copying of all the documents designated below, in accordance with the instructions and pursuant to the conditions contained in Attachment A, hereto.

1. This Request is being submitted within 2 business days of the receipt by the undersigned of a copy of the transcript of the deposition testimony of Darrell Bryan upon which the requests are based.

The documents requested include:

1. The promissory note executed by Burley Broadcasters, Inc., licensee of WSMG(AM), for the benefit of the Greene County Bank in the principal amount of \$ 300,000.00, dated on or about March 1, 1989.

2. All documents creating, evidencing or relating to the pledge of the stock of Burley Broadcasters, Inc., licensee of WSMG(AM), to the Greene County Bank or any other person or institution.

3. Any other documents evidencing any outstanding indebtedness of Burley Broadcasters, Inc. to the Greene County Bank or any other person or institution and any other documents creating, evidencing or relating to any pledge of stock of or the grant of any security interest in the assets of Burley Broadcasters, Inc., or in any other assets used in the operation of WSMG(AM).

The production of the foregoing documents will lead to the discovery and preservation of evidence relevant to the diversification criterion under the standard comparative issue. While Bryan has proposed that in the event his application is granted he will divest his interest in WSMG(AM), he testified at his deposition that Burley Broadcasters, Inc., the licensee of WSMG(AM) of which he is the sole shareholder, remains indebted to the Greene County Bank in an amount in excess of \$ 200,000.00 on a 1989 promissory note having a principal amount of \$ 300,000.00,

which indebtedness is secured by both a pledge of the stock of Burley Broadcasters, Inc. and a security interest in all of WSMG(AM)'s physical assets, as well as the personal guaranty of Bryan and his wife. Bryan acknowledged that he has had no discussions with the Greene County Bank regarding the sale of WSMG(AM), has not had the station appraised, has not received any offers to purchase the station and that his belief that the station would sell for an amount equal to or greater than the outstanding indebtedness is based solely upon his personal opinion. Accordingly, the foregoing documents are relevant to Bryan's ability to divest his interest in WSMG(AM), as he has proposed, a consideration which is clearly relevant under the standard comparative issue.

Respectfully Submitted

SBH PROPERTIES, INC.

By: 
Timothy K. Brady
Its Attorney

P.O. Box 986
Brentwood, TN 37027-0986
(615) 371-9367

February 2, 1994

ATTACHMENT A

1. As used herein, the term "document" means, but is not limited to, the original and all copies (regardless of origin and whether or not including additional writing therein or attached thereto) of agreements, memoranda, books, reports, manuals, instructions, directives, records, forms, notes, letters, notices, confirmations, telegrams, pamphlets, notations of any sort concerning conversations, telephone calls, meetings, or other communications, bulletins, transcripts, diaries, analyses, summaries, correspondence and enclosures, circulars, opinions, studies, investigations, questionnaires and surveys, worksheets, and all drafts, preliminary versions, alterations, modifications, revisions, changes, amendments and written comments concerning the foregoing.

2. These requests include documents in the possession of Respondent and/or each individual who acts, or has acted at relevant times, as an agent or representative of Respondent. These requests are continuing in character, so as to require supplemental responses if further or different documents are obtained prior to, during or subsequent to the hearing in this proceeding.

3. As to any document with respect to which a claim of privilege is asserted, Respondent should identify the document with reasonable particularity, i.e., by date, title, name of preparer, originator, and/or transmitter of the document, recipient of the document, present custodian of the document, and the subject matter of the document, and state the grounds for the assertion of privilege.

4. If any document requested to be produced is no longer in the possession or control of the Respondent's principals or agents or is no longer in existence, identify such document fully and state whether it is: (1) missing or lost; (2) destroyed; (3) transferred voluntarily or involuntarily to others, and if so, to whom; (4) otherwise disposed of, and, in each instance explain the circumstances surrounding an authorization for such disposition and state the approximate date thereof.

EXHIBIT B

BEFORE THE
Federal Communications Commission
Washington, DC 20554

In re applications of)	MM Docket No. 93-241
)	
DARRELL BRYAN)	File No. BPH-920109MA
)	
SBH PROPERTIES, INC.)	File No. BPH-920123MD
)	
For a Construction Permit)	
for a New FM Station on)	
Channel 276A (107.3 MHz))	
in Tusculum, Tennessee)	
To: The Hon. John M. Frysiak		
Administrative Law Judge		

**OPPOSITION TO SUPPLEMENTAL REQUEST FOR
PRODUCTION OF DOCUMENTS**

Darrell Bryan, by his attorneys, hereby opposes the supplemental request for documents filed by SBH Properties, Inc. The certificate of service of the request bears a date of February 1, 1994; however, a copy of the document was not received by counsel until February 12, 1994. The delay in the mail delivery may have been caused by the severe winter weather. In view of the delay, this opposition is timely. In support of this opposition, the following is shown:

1. SBH requests that Bryan produce the promissory note and any other documents related to the indebtedness of Mr. Bryan and the licensee of WSMG(AM) to the Greene County Bank which financed Mr. Bryan's purchase of WSMG.

2. The justification offered by SBH is that these documents relate to Mr. Bryan's ability to divest his interest in WSMG. However, the Commission has never required that applicants that propose to divest an existing broadcast interest provide an appraisal or other evidence that

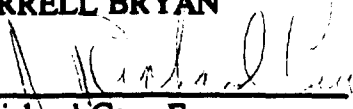
the existing station can be sold for a particular price. The reason for this is that a substantial amount of time will pass before a successful applicant will be in a position to have to divest, and appraisals and offers to purchase would become stale, and therefore, meaningless. The Commission has always accepted an applicant's divestiture pledge. In addition, the Commission conditions any grant on such divestiture.


3. The SBH request is based on the unsupported insinuation that the bank loan may somehow prove to be a bar to the sale of WSMG. However, SBH offers no specific factual showing that the existing loan arrangement will have any impact on the ultimate sale of the AM station. It is clear from the SBH supplement that SBH is engaging in speculation and surmise. However, in order to eliminate any question about the position of the bank, attached hereto as Attachment A is a letter from the President of Greene County Bank in which it is made clear that the existing loan arrangement will in no way prevent the sale of WSMG.

WHEREFORE, in view of the foregoing, the Presiding Officer is requested to deny the motion and issue a protective order.

Respectfully submitted,

DARRELL BRYAN

By: 
J. Richard Carr, Esq.
P.O. Box 70725
Chevy Chase, MD 20813-0725

By: 
Richard J. Hayes, Jr., Esq.
13809 Black Meadow Road
Spotsylvania, VA 22553

His Attorneys

February 15, 1994

ATTACHMENT A

(Fax copy - original, signed letter will be supplied when received)



MEMBER
FEDERAL DEPOSIT INSURANCE CORPORATION

greeneville tennessee 37744

February 15, 1994

To Whom It May Concern:

It has come to my attention that Darrell Bryan has proposed to sell his radio station, WSMG, in the event he is granted a construction permit for a new FM station in Tusculum through the hearing process.

This bank financed the purchase of the station by Mr. Bryan in March 1989 and the assets are pledged as security for the loan. If Mr. Bryan receives a grant of the FM station, the bank would not interpose any bar to the sale of WSMG.

Mr. Bryan has stated to me that he is confident that the AM station can be sold at a price that will enable him to repay the entire amount of the note to the bank. However, if WSMG is sold for an amount that is less than owed to the bank, any shortfall would be handled through a new note with Mr. Bryan who is a long-time customer of this bank which is thoroughly familiar with his financial situation.

Sincerely,

Stan Puckett
President

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 21st
day of February, 1994, served a copy of the foregoing Motion to
Compel by First Class mail, postage prepaid upon the following:

Honorable John M. Frysiak **
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW, Room 223
Washington, DC 20554

Robert A. Zuaner, Esq.
Hearing Branch
Federal Communications Commission
2025 M Street, NW, Room 7212
Washington, DC 20554

J. Richard Carr, Esq.
P.O. Box 70725
Chevy Chase, MD 20813-0725
(Co-counsel for Darrell Bryan)

** Via Federal Express


TIMOTHY K. BRADY